IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1089

DR. MILTON MARGOLES, M.D.,

Petitioner,

vs.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

Page

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

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OPINIONS BELOW

The unreported opinions and orders below of the District Court and of the Court of Appeals are set forth in the printed appendix to the Petition.

QUESTIONS PRESENTED

1. Whether, under *National Hockey League v. Metropolitan Hockey Club*, 96 S.Ct. 2778 (1976), the Court of Appeals correctly upheld the District Court's exercise

of discretion in dismissing plaintiff's action pursuant to Fed.R.Civ.P. 37(b)(2)(C) for willful disobedience of discovery orders given to him personally by the Court.

2. Whether the Court of Appeals correctly decided that the District Court had not abused its discretion in denying to plaintiff an evidentiary hearing on a Rule 60(b) motion to vacate the judgment of dismissal where:

a) Prior to ruling on the Rule 60(b) motion, the District Court received from the plaintiff affidavits providing "voluminous factual detail" explaining the reasons for non-compliance; and

b) The Court of Appeals agreed with the District Court that a hearing with further oral argument and testimony was unnecessary and would have been cumulative.

STATEMENT OF THE CASE[1]

The Case Below

Plaintiff alleged in the suit below, and defendants denied, that he had been slandered by defendant Johns, a newspaper reporter, in three telephone conversations with three persons on Congressman McClory's staff in August and September, 1970. He also joined the newspaper-employer as a defendant. The suit, jurisdiction based on diversity of citizenship, was filed on August 18, 1972.

[1] In addition to other inadequacies, Petitioner's Statement contains some factual assertions which are not in evidence, and are inconsistent with the evidence of record, as will be discussed below.

Initial Discovery Attempts By Defendants

On April 8, 1974, subsequent to depositions taken by plaintiff, defendants' counsel advised plaintiff's counsel[2] that he wished to depose Dr. Margoles and his son, Perry Margoles, during that month pursuant to the prior course of discovery by stipulation without subpoenas or formal demands. (R. 89).[3] In an April 9 letter, he listed documents to be produced including writings to or from Congressman McClory or any member of his staff; statements or writings by them; and writings relating to conversations with any of them. (R. 94).

On April 18, 1974, plaintiff's counsel advised that Dr. Margoles would be unavailable through the month of April and, advising that he had a conflict, asked defendants' counsel to request the Court (Judge Reynolds) to postpone the status conference scheduled for April 26; it was accordingly adjourned to June 14, 1974. (R. 90).

One week before the adjourned status conference, plaintiff moved that Judge Reynolds recuse himself from the case. (R. 28-37). Defendants opposed the motion on the ground that plaintiff's affidavit established no cause, and that the motion (based on occurrences over ten years old), nearly two years after commencement of the suit, was not timely. Defendants noted the delays that might be caused by a recusal. (R. 50-51). Subsequently, without any ruling on the motion, the case was one of those transferred to Judge Warren upon his appointment to the Court.

[2] As in the Petition, respondents' references to "plaintiff's counsel" or "petitioner's counsel" are to attorney Wayne B. Giampietro, and not to Perry Margoles who became counsel of record for petitioner after the Court of Appeals had affirmed the District Court's decisions.

[3] References to pages of the record as certified to this Court will be made, e.g. (R. 70). References to the appendix to the Petition will be made, e.g. (A. 3a).

Second Attempt By Defendants To Obtain Discovery

Shortly after the transfer to Judge Warren, defendants repeated their request for the depositions of Dr. and Perry Margoles and the documents outlined in earlier letters. A December, 1974 date was set for the depositions; they were adjourned at plaintiff's counsel's request to January 7, 1975. (R. 90).

During those depositions, some of the requested documents were produced, but not all those which had been requested, although no objection had been made. It was agreed that there would be further production by plaintiff. (R. 91). On January 9, 1975, plaintiff's counsel mailed some additional documents, stating: "As soon as I have the other documents which you requested, I will contact you." However, no more documents were sent. (R. 91).

On February 6, 1975, defendants' counsel again wrote plaintiff's counsel reminding him that documents were still to be produced. (R. 91). Finally, the matter was brought to the District Court's attention at a pretrial conference on April 25, 1975.

Third Attempt By Defendants To Gain Discovery — With Assistance Of The District Court

At a pretrial conference on April 25, 1975, before Judge Warren, jury trial was scheduled for a day certain — September 22, 1975 (R. 91) — and the final pretrial conference was scheduled for August 12 (later changed to August 15), 1975. (Docket Entry). The production of documents not yet made by plaintiff was discussed. (R. 91). Plaintiff, his counsel, and his son Perry were

present. (A. 13a). In a letter to counsel on April 29, 1975, the Court summarized the conference, and concluded:

> "In closing, the Court would remind plaintiff that he has agreed to produce certain documents for the defendants. . . ." (R. 91).[4]

On April 28, 1975, defendants' counsel also wrote plaintiff's counsel again, itemizing the documents yet to be produced. One of the items specified was "[t]he original of the Day-Timer maintained by Perry for the period April 18, 1970, through November 27, 1972."[5] However, there was no further production by plaintiff until August 14, 1975, the day before the final pretrial conference. Counsel for plaintiff had written a few days before, saying that Perry would deliver to defendants' counsel "those documents which you requested us to produce, as set forth in your letter of April 28, 1975." (R. 92).

On August 14, Perry produced some, but not all of the documents which had been specified. As to the "Day-

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[4] Petitioner says (Petition, p. 7, fn.) that this was not an "admonition or order," and that it did not even provide a "deadline." That there were time constraints was implicit, not only because the question arose out of the prior failures to produce which were called to the Court's attention, but because the Court, at the same time, had set the matter for trial in September and had scheduled a final pretrial conference in August. (R. 91). The Court's written summary and reminder of the plaintiff's agreement to produce made before the Court should have imposed an awareness of obligation, and should reasonably have been understood to have the effect of an order, as the Court characterized it. (Tr. 41).

[5] Plaintiff's son, Perry, maintained a diary of meetings, conversations, and events of significance in his various efforts on behalf of his father, including contacts with the McClory office. (R. 293-95). During the depositions in January, 1975, some typed excerpts of diary entries were produced in response to the demand for documents. (R. 273, 278). The originals of those diaries for the entire period encompassed within the few provided excerpts [4/18/70-11/27/72] were thereupon requested by defendants, which request was renewed in counsel's letter of April 28, 1975. (R. 97).

Timer," he produced copies of log sheets for only 16 days of the requested 31-month period. Also, the production of correspondence with Congressman McClory's office was incomplete, and some other documents, too, appeared to be incomplete or missing. (R. 98-100).

On August 15, The District Court Personally Ordered Plaintiff To Produce Documents Within 35 Days. The Order Was Not Obeyed.

On August 15, 1975, Dr. Margoles, his counsel, and his son Perry personally attended the final pretrial conference. Plaintiff asked that the trial, set for September 22, 1975, be adjourned because of other matters in which he was involved, particularly problems and litigation regarding a hospital building. (A. 14a). The Court granted the request.[6] Trial was rescheduled for January 12, 1976, and a final pretrial conference for January 5, 1976. (Docket Entry).

The document production not yet completed by plaintiff was again brought to the Court's attention. (R. 92). The Court ordered plaintiff to produce the remaining documents by September 6, 1975. Plaintiff asked for more time; the Court granted an additional 13 days, to September 19, 1975. (R. 93). The Court sent a summation of the conference to counsel on August 19, 1975, specifying that the documents were to be produced by September 19, 1975. (A. 14a).

Following the conference, plaintiff again failed to produce, in disobedience of the Court's order.

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[6] Petitioner's suggestion (Petition, p. 19) that the District Court granted the adjournment with knowledge of "serious illness" of plaintiff is not only unsupported by the record but is inconsistent with his Petition which claims no "illness" prior to September 10. (Petition, p. 10).

One Month After The Ordered Production Deadline Had Passed, Defendants Moved To Dismiss

On October 23, 1975, more than a month after the ordered discovery deadline of September 19 had passed, defendants moved for dismissal under Fed.R.Civ.P. 37 (b) (2) (C). (R. 88-116).

The first communication from the plaintiff subsequent to the motion for dismissal was on November 11, 1975, when counsel for plaintiff offered to produce the documents on November 24. Defense counsel said he would receive them but without prejudice to the pending dismissal motion. (R. 288).

Plaintiff's Response To The Dismissal Motion

In the brief filed by counsel, and in Perry's supporting affidavit dated November 17, 1975 (R. 117-121), there was no reference to ill health of plaintiff or to misunderstanding between plaintiff or his son, and their counsel. There was no claim that the order had been forgotten or that there had been an inability to perform. Rather, Perry's affidavit stated, *inter alia,* that problems had arisen, including litigation brought by his father concerning the hospital building in Milwaukee, requiring "substantial time and effort" on the part of plaintiff and Perry; that they had caused Perry to spend a minimum of four days per week in Milwaukee, Chicago and Madison, and had "hindered" him in producing the documents. (R. 118-120).

The Post-Motion Document Production

On November 24, 1975 (two months after the deadline of September 19, one month after the motion to dismiss

was filed, and six weeks prior to the scheduled trial), Perry Margoles and plaintiff's counsel delivered the subject documents to defense counsel.[7] It was understood that the receipt of the documents was without prejudice to defendants' motion to dismiss. (R. 288, 290).

Oral Argument, And Decision By The District Court

On Monday, January 5, 1976, at the final pretrial conference, plaintiff's counsel moved that the scheduled trial date of January 12, 1976, be adjourned to early April, 1976, on the ground that Dr. Margoles had become ill "on or about December 9, 1975." (R. 150).

The Court then heard oral argument on the motion to dismiss. Plaintiff's counsel admitted that there had been "perhaps some unwarranted delay," and added, "I am not sure specifically why some of these documents were not produced earlier than they may have been." (Tr. 19). He conceded the documents were proper subjects of discovery, saying that "at all times I have agreed because

[7]The documents consisted of a correspondence folder marked "McClory," a packet of additional correspondence with members of the McClory staff and another prospective trial witness, three bound volumes of Perry's "Day-Timer," including 33 pages of notes which referred to January, 1971 conferences in Washington containing specific reference to Alida Johns and the alleged slander, some additional notes, a memo, and a letter. (R. 289, 292-97).

The Day-Timers contained many references to: Mr. McClory, discussions with or concerning the persons to whom Johns allegedly communicated slander, notes and memos about the alleged calls, and matters (unrelated to the alleged slander) which caused anxieties for the plaintiff during the period for which he was seeking damages from defendants. (R. 289, 292-97). One of the documents first produced on November 24 was a letter from Perry to one of the alleged slander witnesses prior to his deposition by plaintiff, enclosing memoranda, and Perry's notes and summary of events. (R. 274, 282-84). Perry explained this had been misfiled. (R. 192).

I thought it was proper that these documents be produced." (Tr. 21).

In dismissing the case, the District Court said:

> ". . . [T]he Court is persuaded that it is one of the unusual cases in which the Court should and does make a specific finding that the failure to produce herein is willful . . . ." (Tr. 43).

An order of dismissal (A. 12a-18a) and judgment (R. 159) were entered on January 8, 1976.

Plaintiff's Motion To Vacate The District Court's Judgment

Plaintiff filed a motion to vacate under Rule 60(b) on February 4, 1976. (R. 160-61). Included in the briefing and affidavits were two affidavits filed by Perry Margoles on February 4 and on February 24, 1976, comprising facts and legal argument totaling over 130 pages of text and exhibits. (R. 162-268, 360-84).

The motion to vacate and affidavits supplied extensive detail as to the other matters in which Perry and/or his father had been involved, i.e., the hospital building matters (e.g., R. 172-77, 215-41, 361), civil rights and defamation litigation by Dr. Margoles against members of the Wisconsin Board of Medical Examiners and others in the Western District of Wisconsin (e.g., R. 171-72, 242-68, 361), and Perry's involvement in arranging for and moving his father's medical office to a new location in November and December, 1975, and January, 1976. (R. 365). It recited also that Dr. Margoles had developed a "proctological condition" in the first week of September, 1975 and that his activities were thereafter curtailed. (R. 179). He said plaintiff had been attending "a number of important conferences" in Milwaukee and Chicago

regarding his hospital building, had traveled to St. Louis for the same purpose on September 7-8, but that thereafter such "trips became difficult for him and less frequent," and that there had been surgery for the condition on October 20. (R. 179).[8]

Perry, in his affidavits, asked for a hearing so that he could "answer any questions you may have in order to convince you that we have been acting in good faith" (R. 163), at which hearing he offered to "go through calendar and Daytimer entries, bills, and receipts which will document my travels for much of the period between August 15 and October, as well as my father's hospitalizations." (R. 368). He set forth examples of the document production which he contended showed defendants had not been prejudiced, and stated that at a hearing he could demonstrate it further. (R. 368-74).

The District Court, after reviewing the record as supplemented, observed that the plaintiff's arguments remained substantially the same (A. 19a), and denied the motion to vacate. (A. 18a-20a).

The Seventh Circuit's Affirmance

On appeal to the Seventh Circuit, plaintiff again contended that his failure to comply with the trial court's order was justified because of the press of conflicting interests and ill health. The Court of Appeals noted that the District Court had twice found that the failures to produce were willful, and it held, on review of the record, that these findings were supportable. (A. 9a).

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[8] Perry's first affidavit (R. 117-21), filed in opposition to the motion to dismiss in mid-November, did not mention the proctological episode or assert it as a reason for non-compliance. The surgery, of course, occurred a month *after* the discovery deadline.

As to plaintiff's claim that an evidentiary hearing should have been provided on the motion to vacate, the Court of Appeals held that the District Court had been provided with voluminous factual detail, that further oral argument and testimony would only have been cumulative, and that there was no abuse of discretion in not providing further hearing. (A. 11a).

The Court of Appeals affirmed the judgment of dismissal and the denial of plaintiff's motion to vacate the judgment. (A. 11a). Plaintiff then petitioned for rehearing. Petitioner's counsel, Mr. Giampietro, did not appear on that petition. He was replaced by Perry Margoles. The Court of Appeals denied the petition on November 16, 1976. (A. 12a).

ARGUMENT

The present case does not warrant review by this Court on certiorari. The Court is being asked to re-examine facts which were thoroughly considered by the two courts below. The decision below is manifestly correct. There was a sufficient factual basis for the finding of willful disobedience, and the dismissal was warranted. There is no conflict of decisions, and there is no important question of law requiring decision by this Court.

I.

The Decision Below Is Clearly Correct

Petitioner urges that the decision below ignored the holding of *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), that Rule 37 does not authorize dismissal of a complaint for a party's non-compliance with a discovery order where that non-compliance is "due to inability, and

not to willfulness, bad faith, or any fault of" the party. On the contrary, applying the standards of *Societe,* the District Court specifically found that the non-compliance by plaintiff was willful and the Court of Appeals, on review of the record, held that the finding was supportable. (A. 9a).[9] It is respectfully submitted, there being no special circumstances here which would warrant otherwise, that there is no need for this Court to review these concurrent findings of two courts. *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275 (1949).

We will nonetheless discuss those findings briefly. First, however, on this subject, we must point out that petitioner, who is now trying to shift the blame to his counsel below, has made allegations in the Petition which are not in evidence, and are inconsistent with the evidence of record.

On pages 2-3, 10 (first paragraph), 27 and 31 of the Petition to this Court, in a context of illness and hospital building problems, it is asserted that, *prior to the September 19 deadline,* Perry asked his father's attorney to bring such developments to the Court's attention and obtain a rescheduling, and that counsel told Perry he was requesting a rescheduling. There is no such evidence in the record. The voluminous letter-affidavits written by Perry to the Court in February, 1976 made no mention of any such communications. That claim first appeared below, without evidentiary support, in the petition for rehearing

[9] Petitioner misconstrues a statement in the opinion of the Court of Appeals (Petition, p. 15), saying the Court noted plaintiff's narrative of hardships were "reasonable explanations" for non-compliance. The reference was simply the Court's notation of the petitioner's own characterization of the reasons being offered. (A. 9a).

filed in the Court of Appeals after Perry replaced prior counsel. (Doc. 42, pp. 1-3).[10]

The record reveals statements to the contrary. Plaintiff's counsel said in a brief that he was not aware plaintiff was ill until early December. (R. 389). Perry said he was not certain counsel was aware of his father's illness during September and October, 1975 (R. 366), and said that while counsel knew of hospital problems from August 31 affidavits drafted by Perry in the "Civil Rights case" in another court, his knowledge was "minimal" and he was not familiar with the "multitude of specific new problems and demands which arose . . . on and after September 1." (R. 365-66). In that same affidavit, Perry said that, after the development and convergence of problems in the weeks following the August 15 pretrial, Perry "spoke with him [Mr. Giampietro] only after receiving a letter about producing the remaining documents . . ."[11] and during the December illness of his father. (R. 365).

Turning to the Court's findings, there is ample support for the finding of willfulness, the ascribing of responsibility for the non-production to plaintiff (Tr. 42), and

[10] The only record reference in that petition for those assertions (and it gives no support) was a copy of an October 16, 1975 letter from Perry to Giampietro filed with the District Court on March 8, 1976. It made no reference to, or suggestion of, any prior conversations with petitioner's counsel and made no reference to the discovery schedule. (R. 424-25). Written 27 days after the September 19 discovery deadline, it discussed the need for more time for plaintiff to prepare his case for trial, and asked counsel to get an extension of the January trial date. It said nothing about the discovery owed defendants. (R. 424-25). The March 8, 1976 transmittal letter to the court made no claim that there had been prior discussions with counsel about the discovery deadline or the trial. (R. 424).

[11] Petitioner states that such a letter was sent to Perry on October 28, 1975. (Petition, p. 11).

the exercise of the Court's discretion to dismiss the action. The document request commenced in 1974. On August 15, 1975, following a history of unsuccessful attempts by the defendants and the Court to elicit full production from plaintiff, and an adjournment of the trial at plaintiff's request, plaintiff was ordered to produce by September 19 and a final pretrial conference and trial were scheduled. The deadline for production was imminent — 35 days away. The order had urgency; it was current and necessarily in the consciousness of the plaintiff and his son. They have not denied that, nor have they claimed they forgot the order. They have said they were busy on other matters. But plaintiff did not demonstrate that he was unable to produce because of those other matters. Such a claim would be baseless; the production of the balance of the documents, including bound diaries and correspondence (R. 290), did not require extensive effort or time. Indeed, when faced after the deadline with the dismissal motion, Perry offered to deliver the documents "immediately" to plaintiff's counsel. (Petition, p. 11).

The explanation for plaintiff's failure to obey the order is succinctly stated in Perry's first affidavit. The press of other activities (litigation brought by plaintiff, and his property problems) "hindered" the production. (R. 120). Plaintiff and his son chose to give priority to those other matters. Such an excuse for disobedience of an order can hardly be accepted or treated lightly by a court.

The Petition is replete with references to plaintiff's illness. However, there is no claim that any illness occurred before the first week in September, and even then his business activities were not completely curtailed. (R. 179). The surgery in late October and the hospitalization in December were well after the fact.

The District Judge, whose conferences were personally attended by plaintiff, was personally familiar with the circumstances under which the discovery issues arose. Those considerations which justify liberal support for a trial court's fact finding and the granting of discretion to trial courts in Rule 37 motions are particularly applicable here.

Petitioner urges that plaintiff complied fully with the discovery order, albeit "tardily." (Petition, p. 2). If "compliance" with a direct and immediate order personally given by a federal judge to a litigant can be achieved by "complying" two months after the order and one month after a motion to dismiss, the purpose of Rule 37 would be negated and the authority of the trial judge and the administration of the court would be greatly prejudiced.

II.

This Case Presents No Important Federal Questions

Petitioner strains unsuccessfully to find significant issues of unresolved federal law in this case. He maintains it is the vehicle by which this Court can determine whether there are "any due process limitations" upon a District Court's "initial" imposition of sanctions under Rule 37. (Petition, p. 16). The existence of such limitations already has been clearly defined by this Court in *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), and has been followed consistently by the lower courts.

If the question posed is meant to suggest, as pages 17-18 of the Petition indicate, that constitutional limitations upon judicial power prevent a district court from dismissing a case until a lesser sanction has been (unsuccess-

fully) imposed at least once, the answer seems clear. There is no case support for such a proposal, nor should there be, consistent with either the coercive or the deterrent purposes of the Rule most recently noted in *National Hockey League v. Metropolitan Hockey Club,* 96 S.Ct. 2778 (1976).

Further, in the case at bar, the sanction of dismissal was imposed only after the District Judge twice had personally told plaintiff to produce the documents. The ultimate result of plaintiff's conduct was not in response to the District Court's "initial" intervention but, rather, the inevitable consequence of continued disregard.

Petitioner suggests that for an *initial* offense, there should be a constitutional restriction against dismissal when "lesser sanctions . . . would be equally effective." (Petition, p. 16). Presumably, a dismissed and chastened litigant will *always* maintain that some proscription short of dismissal would have been "equally effective." But, as this Court instructed in *National Hockey League,* an important consideration is the deterrent effect upon subsequent litigants who might be tempted to flout discovery orders. Clearly, the purposes of Rule 37 would be negated and the authority of the Court eroded if litigants knew that even willful disobedience could not result in dismissal until a second offense.

Nor does this case present an important question as to a possible misconstruction or misapplication of the *National Hockey League* decision. Petitioner suggests that the Court of Appeals misconstrued the decision in *National Hockey League* and that other courts are likely to make a similar error. But there is nothing unclear in this Court's decision in that case and certainly no aspect of it which requires clarification. It reaffirms *Societe Internationale v. Rogers* and makes it clear that the basic question in reviewing Rule 37 dismissal cases is whether the District Court abused its discretion. Not only does the decision of the Court of Appeals in this case (A. 3a-11a) reflect a clear understanding of *National Hockey League,*[12] so also do the decisions of the other courts of appeals which have considered similar cases subsequent to the *National Hockey League* decision.[13]

Petitioner also maintains (Petition, pp. 16-17, fn. 4) that the Court of Appeals misconstrued *National Hockey League* as preventing it from reversing "first offense" dismissals which earlier it would have considered an abuse of discretion, citing two Seventh Circuit cases. That contention is incorrect on both counts: (1) the cases cited are inapposite,[14] and (2) the Court of Appeals certainly has not taken a position that it cannot or will not reverse District Court decisions which represent an abuse of discretion.

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[12] Having found that the District Court's findings of willful disobedience of its orders were supportable by the record (A. 9a), and noting that under *National Hockey League* the test was whether the District Court had abused its discretion, the Court of Appeals affirmed. (A. 9a, 11a).

[13] *Emerick v. Fenick Industries, Inc.,* 539 F.2d 1379, 1381 (5th Cir. 1976); *Asociacion de Empleados, etc. v. Rodriguez Morales,* 538 F.2d 915, 916 (1st Cir. 1976) (involving Rule 41). Although petitioner suggests otherwise (Petition, pp. 17-18, fn. 4), the decision below and the Fifth Circuit's decision in the *Emerick* case, *supra,* are identical in their understanding and application of the principles of the *National Hockey League* case.

[14] In both *Sapiro v. Hartford Fire Ins. Co.,* 452 F.2d 215 (7th Cir. 1971), and *Vac-Air, Inc. v. John Mohr & Sons, Inc.,* 471 F.2d 231 (7th Cir. 1973), cited by petitioner, the Court found that the defendant's conduct was not willful. Neither case held that a dismissal for a first offense would *per se* constitute abuse of discretion.

Petitioner is equally incorrect (Petition, pp. 20-21) in suggesting that the concept of lenity has been eliminated by the Seventh Circuit. What the Court clearly held was that, having determined that the finding of petitioner's willfulness in disobeying the District Court's orders was supported in the record, a lessening of the consequence of such conduct in the context of the case before it "would undermine important objectives of Rule 37." (A. 10a). That is hardly a novel concept and most certainly is not a judicial approach warranting review by this Court.

Neither is there support for the assertion (Petition, p. 21) that the case presents an important procedural question of constitutional proportions. Petitioner does not cite any authority for the proposition, nor does he appear to claim, that he was absolutely entitled to an evidentiary hearing on his Rule 60(b) motion. He does claim that the facts below demonstrate that such a hearing was necessary in this case. However, both courts below, after review of the record, found that no further hearing or testimony was required; that any additional submissions would merely have been cumulative.

The question posed by petitioner assumes "a material dispute as to wilfulness or prejudice." (Petition, p. 21). Unlike those cases which have held a dismissal based upon conflicting evidence on crucial issues to have been premature absent some form of evidentiary hearing,[15] this case involved a detailed and voluminous record which

[15] *E.g., Flaks v. Koegel,* 504 F.2d 702 (2nd Cir. 1974); *Dorsey v. Academy Moving & Storage, Inc.,* 423 F.2d 858 (5th Cir. 1970). In *Flaks,* there was a serious question as to whether the defaulting party even knew of the order he was said to have disobeyed. The equally material question in *Dorsey* was whether the plaintiff had in fact exhausted all resources in attempting to comply with a document discovery demand and was therefore physically incapable, in the *Societe* sense, of complying.

the two courts below found adequate to set forth the facts. The issue was principally as to the ultimate findings to be determined from those facts.

Petitioner suggests that he could have produced more evidence had there been a hearing. However, as was obvious to the courts below, what he had presented had already become repetitive and cumulative. No restriction was put on his submissions. He submitted two sets of affidavits and exhibits totaling over 130 pages. (R. 162-268, 360-84). It is difficult to conceive that evidence he considered significant was not included.

As he did below, petitioner attempts to minimize the value of the withheld documents and thus the prejudice to defendants. This approach, of course, ignores the prejudice to the Court and the flouting of its authority which clearly attends the willful disobedience of a court's order and should alone be sufficient to justify Rule 37 sanctions. The District Court noted that plaintiff's disobedience had been prejudicial "to the administration of the Court." (A. 17a; Tr. 42-3). This approach also ignores the fact that plaintiff conceded that the documents were proper subjects of discovery (Tr. 21), and that the Court found they were material, and that defendants had been prejudiced (Tr. 42-3; A. 17a).

Petitioner argues (Petition, p. 25) that he had offered to demonstrate with additional documents, if a hearing were held, that defendants were not prejudiced by the late production. But again, there was full opportunity to set forth those exhibits and arguments in the affidavits-briefs Perry sent to the District Court and indeed such presentation was made at length. Petitioner's basic problem is not that the Court did not give him ample hearing; it is that the Court did not agree with his position.

Petitioner advances no valid reason why this Court should undertake to re-examine this issue which was repeatedly examined below.

III.

The Decision Below Is Not In Conflict With Other Decisions

Petitioner urges that the decision is in conflict with other decisions because the plaintiff is being charged with willful disobedience for derelictions he now attributes to his counsel. That position is untenable. The Court correctly attributed the responsibility for the non-production directly to plaintiff. (Tr. 42). This is not one of those cases in which the fault is solely that of counsel, and the party is unaware of, and not involved in, the dereliction. Here, plaintiff and his son were directly involved. They had personally heard the Court's order and knew the deadline. (A. 14a).

Plaintiff's belated attempt to claim that the disobedience was the fault of his former counsel is based on assertions of fact which are not in evidence and are inconsistent with the evidence. (See pp. 12-13, this Brief).

Moreover, the "conflict" which petitioner tries to find in the cases applying the principles of *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), is non-existent. The teaching of that case is clear for any court confronted with similar facts:

> "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent. . . ." *Id.* at 633-34.

Petitioner asserts (Petition, p. 32) that this case "exemplifies the need for recognizing that some types of neglect by counsel" should cause the sanctions to be imposed upon the lawyer rather than the client, "absent bad faith or fault by his client." The latter phrase clearly removes this case from that consideration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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